# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 7, 2000 |
| v | No. 219248<br>Eaton Circuit Court |
| MEL WALLACE, JR.,<br><br>Defendant-Appellant. | LC No. 98-020428-FC |

Before: Talbot, P.J., and Hood and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529; MSA 28.797, one count of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), one count of conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1), MCL 750.529; MSA 28.797, and one count of conspiracy to commit first-degree home invasion, MCL 750.157a; MSA 28.354(1), MCL 750.110a(2); MSA 28.305(a)(2).[1] The trial court sentenced defendant as a third habitual offender, MCL 769.11; MSA 28.1083, to concurrent terms of twenty to forty years' imprisonment for each conviction. Defendant appeals as of right. We affirm.

Defendant challenges two jury instructions relating to the prosecutor's theory that he aided and abetted the principal(s) in committing the charged offenses. Because defendant did not object to the instructions, our review is limited to determining whether defendant has demonstrated plain error that was prejudicial, i.e., that affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

We review jury instructions as a whole to determine if the trial court made an error requiring reversal. *People v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999). The instructions must include all the elements of the crime charged and must not exclude any material issues, defenses, or theories if there is evidence to support them. *People v Piper*, 223 Mich App 642, 648; 567 NW2d

[1] The jury was unable to reach a verdict on the charge of assault with intent to commit murder against John Marshall and the trial court subsequently dismissed that count from the information.

483 (1997). "Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v McFall*, 224 Mich App 403, 412-413; 569 NW2d 828 (1997).

Defendant first argues that the trial court erred in reading CJI2d 8.1, the standard instruction on aiding and abetting, because it erroneously provides that the intent element of the crime may be satisfied by the defendant's knowledge of the principal's intent. We disagree. The intent requirement for aiding and abetting may be satisfied upon a showing that the defendant either intended the commission of the crime (i.e., possessed the same intent as the principal) or knew that the principal intended its commission at the time of giving aid or encouragement. *People v Partridge*, 211 Mich App 239, 240; 535 NW2d 251 (1995). This Court has upheld the validity of the aiding and abetting instruction against similar challenges. See e.g., *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995) and *People v Lawton*, 196 Mich App 341, 351-352; 492 NW2d 810 (1992). Because the instruction accurately states the law, defendant has failed to demonstrate a plain error that affected his substantial rights.

Defendant also contends that the trial court erred in reading CJI2d 8.3, the standard jury instruction on "separate crime within the scope of a common unlawful enterprise," because it allowed the jury to find defendant guilty as an aider and abettor "if the activity by [the principal(s)] was within the common unlawful activity that [defendant] might have expected to happen."[2] Again, we disagree.

Defendant has not explained how the authority he cites supports his claim that the third part of CJI2d 8.3 is "overbroad, erroneous, and confusing." As the appellant, defendant is required to do more than merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Hermiz*, 235 Mich App 248, 258; 597 NW2d 218 (1999). In any event, the use note to the instruction indicates that it is based on an interpretation of the law set forth in *People v Knapp*, 26 Mich 112 (1872), and its progeny. We have found no cases that question the validity of the instruction outside the distinguishable context of felony-murder, see e.g., *People v Kelly*, 423 Mich 261, 277-280 (Williams, C.J.), 286-287 (Levin, J.); 378 NW2d 365 (1985), and we decline to overturn defendant's convictions on the ground that CJI2d 8.3 is defective without clear authority to do so. The record further reveals that the instruction was warranted based on the evidence adduced at trial and that defense counsel explained the instruction to the jury at length during closing argument. Finally,

---

[2] Defendant refers to the third part of CJI2d 8.3, which provides:

> In determining whether the defendant intended to help someone else commit the charged offense[s] of [armed robbery, home invasion and/or assault with intent to murder John Marshall], you may consider whether that offense was fairly within the common unlawful activity of [robbery, home invasion, or assault with intent to murder], that is, whether the defendant might have expected the charged offenses to happen as part of that activity. There can be no criminal liability for any crime not fairly within the common unlawful activity.

defendant has not articulated or otherwise shown how the alleged error affected his substantial rights. *Carines*, *supra* at 763-764.

We also reject defendant's claim that both instructions were erroneous because they did not incorporate his theory of defense that he was not guilty of armed robbery and home invasion because he did not believe that the principals would commit those offenses. The trial court twice informed the jury that defendant claimed that he was not guilty of the offenses because he did not intend to help the principal(s) commit them. The trial court also instructed the jury that defendant's mere knowledge of a plan or his presence during the crime were insufficient to support a conviction under an aiding and abetting theory. After a review of the instructions in their entirety, we conclude that they accurately incorporated defendant's theory of the case, fairly presented the issues to be tried, and sufficiently protected defendant's rights. *McFall*, *supra* at 412-413; *Piper*, *supra* at 648.

Defendant next argues that his convictions for conspiracy to commit armed robbery and conspiracy to commit first-degree home invasion violated the prohibition against double jeopardy[3] because the evidence established only one agreement and one object of the agreement "to enter the [victims'] house and rob them." Based on our review of the record and the evidence presented, we conclude that the jury could have found, beyond a reasonable doubt, that defendant entered into separate agreements to commit two distinct offenses. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993) (elements of conspiracy). Consequently, defendant's argument lacks merit, and we need not specifically reach the double jeopardy issue. See *People v Gauntlett*, 134 Mich App 737, 747; 352 NW2d 310, modified on other grounds 419 Mich 909 (1984) ("appellate courts will not decide constitutional questions when the issue raised can be decided on alternative, nonconstitutional grounds raised in the appeal").

Affirmed.

/s/ Michael J. Talbot
/s/ Harold Hood
/s/ Hilda R. Gage

[3] US Const, Am V; Const 1963, art 1, § 15.